BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of:	)	
JOHN DOE	)	
	)	OAH No. 06-0112-DHS
	)	Agency Case ID 910823

DECISION AND ORDER

[All names have been changed]

I. Introduction

For some time, it has been the policy of the Office of Children's Services (OCS) to conclude investigations of alleged child abuse with a determination that the allegation is "substantiated" or "not substantiated."[1] Substantiated findings have been used in connection with other important decisions affecting the child or the person determined to be the abuser, including decisions about child custody.

In the past, OCS did not offer an accused perpetrator a formal hearing to contest the substantiation of alleged abuse. In 2005, a federal lawsuit entitled *Ruby v. Gilbertson*[2] led to a settlement in which the agency agreed to adopt regulations for a procedure to review such substantiation findings that would comport with due process requirements. A regulation has since been adopted to follow up on this agreement, but it applies only to review proceedings initiated on or after December 30, 2006.[3] In the meantime, OCS committed, in most cases, to offer persons who were the subject of a substantiation finding a hearing before an administrative law judge. This case arose as part of that commitment.

John Doe was the subject of two findings of substantiated abuse issued on the same day in December, 2005. One of the findings substantiated physical abuse and mental injury for an incident in August of 2005, and the other substantiated mental abuse only for an incident in

1 Ex. 26 (excerpt from policy manual).
2 No. A-05-171 CI (JWS) (D. Alaska).
3 7 AAC 54.215 (eff. 12/30/06, Register 180).

October of that year. The facts relating to both incidents were disputed, and OCS caseworker N.N. described the decision to substantiate both allegations as close and difficult.[4] The findings were subsequently used to divest John Doe of most visitation rights with his children. Mr. Doe requested a hearing, which took place in multiple sessions over the course of two weeks in late June, 2006.[5]

After setting out in Section II the standard for making a substantiated finding, this decision reviews the evidence gathered over the course of the hearing, first laying out a general chronological framework in Section III and then returning in more detail to the specific allegations, one by one, in Section IV. It concludes that OCS failed to provide adequate support for either finding at the hearing.

II. Standard to Be Applied

The two substantiated abuse findings at issue in this case were made under section 2.2.10.1 of the Child Protective Services Manual, submitted to the record at Exhibit 26, which supplies a definition of what must be shown to support such a finding. This matter was referred for a hearing to test whether, in light of all the evidence, that definition has been met. Accordingly, as to each of the two findings under review, the single question at the hearing was whether the facts support substantiation under the standard in section 2.2.10.1.

Before turning to a detailed review of the definition, one should note that the manual's definition is not, itself, a law. A finding that the definition has been met may or may not be a valid or useful element on which to base other decisions made by OCS, by other agencies, or by the courts.[6] The present appeal does not encompass whether a substantiated finding made solely under this manual provision can have any legal significance.

---

[4] Cross-exam of N.N., Ytown tape 4B.

[5] The hearing record consists of six audio tapes made in Xtown, six in Ytown, three digital audio files recording a session in Anchorage, and Exhibits 1, 2, 4-7, 10-23, 26, 27, A (pages R12 through R44 only), E-J, and N-O. No other exhibits were offered. By agreement, Exhibit P was to be supplied and admitted after the hearing ended, but it was never supplied.

[6] On its face, the definition appears to do little more than adopt a statutory definition. However, the selection of the statutory definition to adopt may not have been a wholly trivial matter in all respects, as suggested by note 9 below and by the fact that there are other potential statutory guides or standards that might have been chosen for use in some contexts (*e.g.*, AS 47.17.069 or AS 47.10.990(21)).

Given the way the substantiated findings have been used in connection with Mr. Doe's rights, it seems plausible that the manual's parameters for substantiated findings are used to implement, interpret, or make specific part of the law OCS enforces or administers, and that OCS uses substantiated findings in a way that "affects the public or is used by the agency in dealing with the public." If so, past Alaska Supreme Court case law suggests that the agency ought to consider promulgating the definition as a regulation. *See Gilbert v. State, Dep't of Fish & Game,* 803 P.2d 391, 396 (Alaska 1990) (from which the quoted language is taken); *Jerrell v. State, Dep't of Natural Res.*, 999 P.2d 138, 143-44 (Alaska 2000). OCS is confident, however, that the manual provision is nothing but an "internal rule." OCS Post-Hearing Brief at 7.

Section 2.2.10.1 of the Child Protective Services Manual states that **"**[a] substantiated finding is one where the available facts indicate a child suffered harm as a result of abuse or neglect as defined by AS 47.17.290.**"** The parties stipulated that the factual justification is to be tested under the preponderance of the evidence standard.[7] To sustain a finding, OCS must prove that it is more likely than not

- that a child suffered harm and
- that the harm occurred as a result of abuse or neglect as defined in the cited statute.

The statute cited in the manual provision defines "child abuse or neglect" as

> the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby; in this paragraph, "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment of the child's ability to function[.][8]

Note the paragraph-specific definition of "mental injury,"[9] one of the two types of abuse alleged in this case. There is no statutory definition of the term "physical injury" as used in this definition of "child abuse or neglect," nor is any definition offered in the portion of the OCS manual placed into evidence by OCS. The ordinary meaning of this phrase will therefore be applied.

III. Background Facts

John Doe and Jane Roe divorced in 2001. They have two children: G.D., born in October of 1999, and B.D., born in March of 2001. By the time of the events at issue in this case, B.D. was four and G.D. five. B.D. does not seem to have been a particularly verbal child at the time, and had little prepositional awareness.[10] G.D. was quite articulate for her age and was

---

7 OCS Post-Hearing Brief at 2; Doe Closing Argument at 1. There was also extensive oral discussion of this issue. Ytown tape 1A.

8 AS 47.17.290(2).

9 The same statute also contains a freestanding definition of "mental injury," which is slightly different. It is reprinted below, italicizing the material that is additional to the language quoted above and striking through the material that does not appear:

> a *serious* injury to the ~~emotional well-being, or intellectual or psychological capacity of a~~ child as evidenced by an observable and substantial impairment of the child's ability to function *in a developmentally appropriate manner and the existence of that impairment is supported by the opinion of a qualified expert witness*[.]

AS 47.17.290(9). However, the manual provision underlying the findings being tested in this case references only the definition of "abuse or neglect" in AS 47.17.290, and hence seems to tie into the meaning of "mental injury" that has been written into that definition, not the freestanding definition.

10 Direct exam of N.N., Ytown tape 2A. Prepositional awareness is the ability to sequence events.

prepositionally aware.[11] G.D. may have been a child who had learned to expect parental approval from relating negative tales about the other parent. Ms. Roe and her fiancé have fondly nicknamed G.D. "the informer."[12]

In April of 2002 a court granted primary legal and physical custody of both children to Ms. Roe.[13] In August of 2004, Mr. Doe proposed, through his attorney, a negotiated increase in the children's visitation.[14] Ms. Roe responded through her own attorney, refusing the overture and threatening to file a counter-motion restricting Mr. Doe to supervised visitation if he asked for any modification to the existing arrangement.[15] By early 2005, the parties were engaged in an acrimonious custody dispute, with Ms. Roe having followed through on the threat to counter-move for supervised visitation.[16] Letters from Ms. Roe's attorney from this period include a variety of suggestions, short of direct accusations, that Mr. Doe might be a child abuser. Examples range from an allegation of a "refusal to feed the children for an 8-hour period" that "may constitute child . . . abuse" to an assertion, apparently not well grounded, that Mr. Doe's infant by another relationship "died mysteriously" under circumstances that were "suspicious."[17]

The dispute over custody continued through the spring of 2005.[18] At some point, perhaps in early May, Ms. Roe received an itinerary for a proposed two-week trip to Other State in July by Mr. Doe and the two children. On May 17, 2005, Ms. Roe objected in writing to that proposal.[19] At approximately the same time, she made a report of harm to OCS, alleging "that the children are being exposed to ideas about God and the devil which are leaving them confused."[20] OCS screened the report out for lack of alleged maltreatment.[21]

The trip to Other State proceeded without incident. Ms. Roe was "very thankful" that the children returned safely[22] but the dispute over visitation continued. A dispute also developed over an allegation that Mr. Doe was frequenting Ms. Roe's workplace (both parents had business

---

11 *Id*.
12 Direct exam of Roe, Xtown tape 5A.
13 Ex. F.
14 Ex. E.
15 Ex. F.
16 Ex. G, H.
17 Ex. F, G, H. An autopsy revealed that Mr. Doe's newborn son died from a stomach defect. *E.g.,* direct exam of Doe, Anch. digital recording T2 at 0:01:00.
18 Cross-exam of Roe, Xtown tape 5A.
19 *Id.*
20 Ex. A at R13.
21 Ex. A. at R12.
22 Cross-exam of Roe, Xtown tape 5B.

in close proximity on the Xtown [location]). Ms. Roe was denied an *ex parte* order on that issue, but the judge set the matter for a contested hearing on August 24.[23]

Two days prior to the hearing, Ms. Roe made the first of the reports of harm at issue in this proceeding. This first event will hereafter be referred to as "the car seat incident." Ms. Roe reported that B.D. returned from a visitation with a cut wrapping around his lower lip, "deep enough to possibly cause scarring."[24] She reported that according to the children the cut had occurred when Mr. Doe "grabbed his shirt and pulled him to the front seat" and put him into or next to a baby seat there.[25] She reported that daily activity notes provided to her by Mr. Doe and his girlfriend gave two conflicting explanations for the injury, one referencing the move from the back to the front seat and one attributing the cut to an accident at daycare.[26] The following day, Ms. Roe's boyfriend added an additional element to the allegation: that B.D. had been told to lie about the incident and to attribute it to the daycare rather than to his handling by his father.[27]

At the August 24 hearing, Ms. Roe gave testimony about the car seat incident.[28] The judge hearing the case did not issue a protective order. OCS proceeded with the investigation of the car seat incident, interviewing John Doe on August 26.[29] Mr. Doe said that B.D. had been kicking another passenger in the back seat and that he had pulled the boy to the front seat.[30] He said B.D.'s mouth bled a little; he was unsure of the exact cause but believed the cut on the side of the mouth had already been there beforehand.[31] Shortly after this interview, OCS decided that it needed to interview Mr. Doe again, but workload demands at the agency prevented this from happening for a period of many weeks.[32]

Early in October of 2005, Ms. Roe called OCS to check on the progress of the case.[33] She said she felt it was important for "the information from OCS" to be considered in the

---

23 Ex. 22.
24 *Id.*
25 *Id*.
26 *Id*.
27 Ex. 23 at R26.
28 Cross-exam of Roe, Xtown tape 5B.
29 Ex. 23 at R28-27.
30 *Id*.
31 *Id*.; direct exam of N.N., Ytown tape 3A ("He stated that, um, that there might have been a cut on [B.D.]'s face but he wasn't sure that he had received it when he moved him over the seat, that it may have reopened at that point in time causing some bleeding to occur inside of [B.D.]'s mouth. . . . [H]e had stated that that cut had indeed been present [before the incident] on [B.D.]'s face").
32 Ex. 23 at R29.
33 Ex. 23 at R30.

custody proceedings, in which a hearing was scheduled in November.[34] OCS continued to plan to re-interview Mr. Doe when time permitted.[35]

On October 17, Ms. Roe made a new report of harm, the second of the incidents at issue in this case. OCS employee N.N. recorded the report as follows:

> [Jane] stated that the kids spent Saturday and Sunday with [John]. When the kids came home [B.D.] seemed a little down. At bedtime he said Daddy [John] was a bully. Daddy [John] made him take his clothes off in the kitchen because he got hair on his clothes. Everyone laughed. [Jane] talked with G.D. She stated that B.D. had been pulling the fur out of the caribou mukluks. Daddy [John] told him to take off his clothes. [David] and G.D. covered their eyes but [John] made them look.[36]

The event will hereafter be referred to as "the mukluk incident."

Two days after the report, OCS employee Q.Q. and Sergeant J.J. of the Xtown Police Department (XPD) interviewed five-year-old G.D. and her mother at the Roe home.[37] Q.Q. found G.D.'s account credible. G.D. estimated the length of time standing without clothes at 20 minutes, and this estimate became a feature of subsequent OCS evaluation of the incident. G.D. denied being made to look at B.D. while he was undressed.

Again with J.J. present, OCS interviewed John Doe and his girlfriend Susan (pronounced "_____") Johnson on October 31, 2005. The conversation covered both the car seat and mukluk incidents, although the latter seems to have been the main focus.[38] Mr. Doe described a brief incident in which he caught his son pulling hair from the mukluks, had his son remove fur-covered clothes, and sent him upstairs in his underwear to change.

Mr. Doe contacted his attorney immediately after the October 31 interview. On November 1, the attorney wrote OCS and asked to be informed "if there is an active investigation, what the allegations are, and who the caseworker is."[39] There is no documentation that OCS ever contacted Mr. Doe or his attorney until after the investigation was closed out six weeks later.[40]

---

34 *Id.* at R29.

35 *Id*. at R30.

36 *Id.* (quoting from corrected note).

37 *Id.* at R32-30. ____, with a single "__," is Sgt. J.J.'s legal first name.

38 Direct exam of N.N., Ytown tape 3B. The ROC notes for the date do not cover the portion of the conversation devoted to the car seat incident. Ex. 23 at R35.

39 The text of the letter was read into the record during the cross-exam of N.N., Ytown tape 5A. The letter itself, which had been designated Exhibit P, did not become part of the record due to confusion that is documented in various post-hearing pleadings.

40 Cross-exam of N.N., Ytown tape 5A. Ms. N.N. asserts that she believes she once attempted to call the attorney's office, but is not sure whether it was before or after the investigation closed. Her report of contact (ROC) notes document multiple contacts with Ms. Roe but none with the attorney.

In the ensuing weeks Ms. Roe contacted OCS several times to discuss or check on the investigation.[41] On November 14, nearly a month after the mukluk incident, she reported incidents of encopresis with B.D., a difficulty she said he had been having for "a couple of weeks."[42] This alleged condition was never explored with Mr. Doe, his attorney, or B.D.'s other caregivers, nor was it ever evaluated professionally.[43]

On November 16, OCS took a final step with the investigation, speaking with the children's therapist, T.T. T.T. "stated that the children have not mentioned anything during therapy regarding any of the issues that have come to the attention of child protective services."[44]

On November 22, 2005, OCS decided internally that the two reports under investigation would be treated as substantiated.[45] OCS regarded the decision as a close call.[46] In the second week of December, 2005, OCS sent Mr. Doe a "Closing Letter" finding that physical abuse of B.D. and mental injury to G.D. were "substantiated" in connection with the August 22 car seat incident.[47] OCS back-dated the letter by three and a half months to August 23, 2005.[48] On the same day in December, OCS sent Mr. Doe a "Closing Letter" finding that mental injury to both B.D. and G.D. were "substantiated" in connection with the October mukluk incident.[49] OCS back-dated this letter to October 21, 2005.

In January of 2006, Mr. Doe asked for a hearing on the OCS findings.[50] Primarily because of the heavy workload of OCS counsel, the hearing could not be completed until late June.

In the meantime, the two OCS findings were furnished to a psychologist who had been conducting a child custody investigation. Based on the findings, the psychologist amended a

---

41 Ex. 23 at R36-35.

42 *Id.* at R36. Encopresis is a "condition associated with constipation and fecal retention." Taber's Cylopedic Medical Dictionary (1993) at 636. B.D. had reportedly been holding bowel movements at his father's house and then having them at inappropriate times when in his mother's care.

43 Direct exam of N.N., Ytown tape 4A; cross-exam of N.N., Ytown tape 6B.

44 Ex. 23 at R36; cross-exam of N.N., Ytown tape 6B.

45 Ex. 23 at R36.

46 Direct exam of N.N., Ytown tape 3B; cross-exam of N.N., Ytown tape 4B ("Neither one of these was an easy one to determine.").

47 Ex. 2. The date of preparation and mailing comes from direct exam of N.N., Ytown tape 3B and 4A.

48 *Id.* OCS seems to have a computer program or practice that has been set up to back-date letters of this kind to a time soon after the alleged event. Although this creates an appearance that the complaint was investigated and acted upon promptly, it can have undesirable consequences. One consequence of the practice is that it can be impossible to determine the exact date a finding has been made; that is so in this case, where no witness or document could supply a time any more precise than "early December" or "the second week of December." Another consequence is that users of the letters, such as judges deciding custody disputes, are at risk of being misled unless the use of a wrong date is explained to them.

49 Ex. 1. The date of preparation and mailing comes from direct exam of N.N., Ytown tape 3B and 4A.

50 Letter from _____ to _____, January 26, 2006 (attached to DHSS referral to OAH).

prior visitation recommendation and concluded "that the children need immediate relief from their current visitation schedule."[51] On March 17, 2006, relying in turn on the psychologist's amended recommendation, the Superior Court granted Ms. Roe's request that G.D. and B.D.'s father be restricted to supervised visitation. The court reduced visitation to twelve hours per month, supervised by a court-approved non-relative.[52]

In the ensuing months, Mr. Doe did not seek to set up supervised visitation, and his contact with the children essentially came to an end.[53]

IV. Analysis of Incidents of Alleged Abuse

A. The Car Seat Incident

The car seat incident led to an abuse finding with two distinct components: first, that John Doe physically abused his son by handling him roughly while moving him from the back seat to the front, and second, that he mentally abused both children by instructing them to lie about the incident. The two elements will be discussed sequentially.

1. Physical Abuse

The allegation of physical abuse in this case is an allegation of negligent handling. There is no contention that John Doe deliberately injured his son.[54] The OCS caseworker concluded only that "the maneuver in the car was maybe a little bit rougher than it needed to be."[55]

The physical injury at issue is shown in a pair of color photographs at Exhibits 4 and 5, one of which is attached at the back of this decision. Jane Roe took the pictures on August 21, 2005, the day after the event took place.[56] This is the injury that Ms. Roe described to OCS as severe enough to "possibly cause scarring."

The photographs reveal a physical injury to B.D.'s lip. The injury is small and barely visible. In addition to the photographs themselves, evidence of the insignificance of the injury includes the contemporaneous assessment of Ms. Roe's fiancé that it is "not really noticeable."[57]

---

51 Ex. 27. The quotation is from Judge _____ of the Superior Court.

52 *Id*.

53 Direct exam of Doe, Anch. digital recording T2 at 50:50; cross-exam, re-direct, and re-cross of Doe, Anch. digital recording T2 at 54:30-59:30, 1:30:40-1:31:00, 1:36:00-1:36:1:37:50. Based on Mr. Doe's testimony, a complex mix of pride, frustration, hopelessness, and fear of further allegations seems to have played a role in his election not to go along with the tightly restricted visitation program.

54 Administrative law judge (ALJ) exam of N.N., Anch. digital recording at 16:00.

55 *Id.*

56 Direct exam of Roe, Xtown tape 5A.

57 Ex. 23 at R26; *see also* cross-exam of N.N., Ytown tape 6A.

The fact that Ms. Roe initiated a child abuse investigation with an exaggerated description is evidence that she may not be a fully reliable reporter.

Once the report had been screened in and OCS opened an investigation, Ms. Roe acknowledged that the injury was in the nature of a scratch.[58] She met with OCS worker N.N. and described the incident as she said it had been described to her by the children. According to Ms. Roe, Mr. Doe got angry with B.D. in the car, grabbed him by the shirt, and pulled him to the front seat, cutting his lip during the maneuver.[59]

Several other versions of the event were received. G.D., age five, told Ms. N.N. that B.D. had been hitting a friend of the family named Bob and would not stop. She indicated that Mr. Doe stopped the car, took hold of B.D. by the front of his overalls to pull him closer, and then lifted him to the front seat with both arms and put him next to a baby seat there. There was a sharp place on the baby seat where Susan had also been cut, and B.D. was cut on the baby seat during the movement.[60]

B.D. himself, age four, told Ms. N.N. that he was cut on the mouth when Mr. Doe put him in the baby seat. He said that the family was "moose-hunting" at the time (the phrase "moose-hunting" appeared in several accounts and, in this family, seems to refer to driving around very slowly searching for a moose to look at, not to shoot). He indicated that the car was moving and that he was not wearing a seat belt.[61]

John Doe, interviewed a few days later, said that the incident happened when the family was looking for moose along a back road. B.D., who was not belted because they were just going along the road in little hops, had been kicking Bob in the back seat, and Doe reached over the seat and moved the boy to the front seat. According to Doe, B.D.'s mouth bled a little, possibly from reopening an existing cut.[62] There is no record that OCS asked at the time how Mr. Doe moved B.D. or how B.D. reacted,[63] but he has since testified that he used two hands under the boy's arms and that B.D. was upset at being moved.[64]

OCS did not interview Susan independently about the incident, although she was present during the Doe interview. During this joint interview, there is also no indication that Susan was

---

58 Ex. 23 at R25.

59 *Id.* ; see also Ex. 22 (also an account from Jane Roe).

60 The account is taken from a combination of Ex. 23 at R24 and the direct testimony of N.N., Ytown tape 2A.

61 Ex. 23 at R24.

62 Direct exam of N.N., Ytown tape 3A.

63 *Id.*; Ex. 23 at R.27.

64 Direct exam of Doe, Anch. digital recording T2 at 17:10-21:00.

asked for an account of the incident.[65] In its investigation summary, OCS wrote, "At no time, has OCS been allowed to interview Susan without [John] being present."[66] At the hearing, however, the caseworker conceded that she had either not asked, or not pressed, for a separate interview.[67] OCS did not interview Bob (the adult friend B.D. had been kicking), nor a second friend in the car named O.F., although it was aware of both witnesses.[68]

In part because of the history of allegations of poor parenting, it was the practice of John Doe and Susan Johnson to provide Ms. Roe with daily activity logs recording what the children did and ate during each visit. The practice was to make a copy of the logs before bringing the children to the exchange point at the end of the weekend, and then give the copy to Ms. Roe. Ms. Johnson was the person who wrote the logs. Occasionally, she would add a new item to a log as she remembered it on the way to the exchange point, and in that situation the new item would be written onto the photocopy going to Ms. Roe.[69]

On the log for Saturday, August 20, Susan Johnson mentioned two injuries:

> At the fair when digging [B.D.] got sawdust in his eye and it was swollen at night. [B.D.] cut the inside of his lip when [John] moved him from the back seat to the front for being naughty to a friend (kicking him).[70]

On the log for Sunday, August 21, the photocopy given to Ms. Roe had an inked additional line (line 18) that said: "[B.D.] said he got hurt at Katie's daycare (his lip cut)."[71]

At the hearing, Ms. Johnson, one of the people from whom OCS did not pursue an account during its investigation, was able to provide a detailed and credible account of the incident.[72] She said the incident happened on a dirt road right at the end of the day. B.D. was kicking Bob, and did not behave when told several times to do so. Mr. Doe was frustrated with B.D.. He stopped, turned around, and lifted the boy under his arms to the front. B.D. was

---

65 Ex. 23 at R28-27. The interaction with Ms. Johnson seems to have been limited to getting a document and a phone number from her.

66 Ex. 17 at R21.

67 Direct exam of N.N., Ytown tape 3A; Cross-exam of N.N., Ytown tape 6A. John Doe confirms that no request was made to interview Susan alone. He says that while today, after all he has experienced, he would not consider it advisable for an OCS interview to take place without witnesses, at that time he would readily have agreed. Direct exam of Doe, Anch. digital recording T2 at 32:00.

68 Cross-exam of N.N., Ytown tape 4B. Ms. N.N. made one effort to contact O's parents but did not follow up; regarding Bob, she testified that she "neglected" to get his full name from Mr. Doe and therefore did not seek to contact him.

69 Though confirmed in most respects by several witnesses, this description of the practice is drawn primarily from the direct exam of Johnson.

70 Ex. 7.

71 Ex. 6. The fact that line 18 was added in ink on the copy given to Ms. Roe was established through testimony.

72 Direct exam of Johnson and cross-exam of Johnson, Anch. digital recording T1 at 1:45:00 and 2:17:00.

kicking and flailing as he came over. Mr. Doe initially put him in the baby seat (the baby being in Ms. Johnson's arms at the time), but B.D. was angry and kept kicking the dashboard from that perch. Mr. Doe then moved B.D. down next to him. Ms. Johnson remembers a little blood in B.D.'s spittle, but did not see an external source for it at the time. She thinks he cut the inside of his mouth, and that he may have hit his head on the way over the seat, which might explain the bloody spittle. She did not connect the small external cut to this event because B.D. had been asked about it. When asked, B.D. said "Katie did it" (referring to his daycare provider), but G.D. corrected him and said it happened on a tree at daycare. Ms. Johnson remembered the explanation of the external cut on the way to drop the children off on Sunday, and this prompted her to enter that information on the Sunday log. Since she wrote it onto the photocopy, it did not appear on the original that she retained.

OCS explained its substantiation decision regarding the car seat incident in an "Investigation Summary" found at Exhibit 17. The lynchpin of OCS's decision to substantiate physical abuse for this incident was the supposed discrepancy between the August 20 and August 21 logs, and relatedly, the discrepancy between the copy of the August 21 log given to Ms. Roe and the original of the same log that Mr. Doe had at home.[73] In fact, however, the differences are readily explained, as shown by Ms. Johnson's account. Moreover, if Mr. Doe and Ms. Johnson were truly trying to cover up the car seat incident, it is difficult to imagine why, along with the August 21 log, they would have given Ms. Roe an August 20 log saying, "[B.D.] cut the inside of his lip when [John] moved him from the back seat to the front . . . ." The various logs are fully consistent with a much more benign scenario: two adult caregivers reacting to a trivial injury, or perhaps two small injuries in the same area, for which there may be more than one explanation. To its credit, OCS recognized in August that the "discrepancies" might have a benign explanation and made a decision to interview John Doe further about them.[74] Unfortunately, when it finally interviewed him again more than two months later, the agency seems largely to have forgotten to pursue the inquiry.[75]

Ms. N.N.'s testimony at the hearing was that she did follow up, by talking with Ms. Johnson, on one aspect of the discrepancy: the fact that line 18 on Exhibit 6, referring to where B.D. said he got cut, appeared on Ms. Roe's copy of that document but not on the original the Doe household had retained (Exhibit 25). Ms. N.N. testified that Ms. Johnson's explanation for

---

73 Ex. 17 (Investigation Summary).

74 Ex. 23 at R29-28.

75 The ROC notes indicate no followup. Ex. 23 at R35.

this discrepancy was "satisfactory" to her.[76] Discouragingly, the fact that there was an explanation she found "satisfactory" did not prevent Ms. N. from reporting in the November 2005 Incident Summary: "[Susan] and [John] . . . assured the OCS worker that there was a copy at home that matched the reports given to [Jane] and [Tom], although they had already provided OCS with a copy that did not match the reports provided to [Jane] and [Tom]. No adequate explanation was provided for this discrepancy . . . ."[77]

In substantiating physical abuse, OCS made two other unfair observations. First, it said "Information from both of the children indicate[s] that B.D. was dragged over the back of the front car seat causing the cut at the corner of his mouth as well as a scratch by his eye."[78] In fact, neither child had described the incident in those terms, and there is no credible evidence that either of them (or anyone else during the interviews in August) had attributed a scratch by B.D.'s eye to the car seat incident. A scratch by B.D.'s eye can be seen in the August photos, but it was not until the November Investigation Summary that anyone linked it to the car seat incident.[79] Second, OCS contrasted John Doe's statement that he had lifted B.D. with both arms under his armpits with a statement from G.D.: it said "G.D. said he grabbed B.D. by the front of his shirt."[80] In fact, G.D. and John's accounts are consistent. As N.N. has testified, G.D. actually told Ms. N.N. that her father took hold of B.D. by the front of his overalls to pull him closer, and then lifted him to the front seat with both arms. The more negative rendering of the account—"Daddy grabbed his shirt and pulled him to the front seat"[81]—did not come directly from G.D. but rather from her mother, purportedly quoting G.D.

In making its substantiation finding, OCS essentially adopted Ms. Roe's version of the car seat incident. In so doing, it did not take into account two indications that she was not a fully reliable source: the fact that her initial description of the injury was exaggerated,[82] and the fact that her rendering of G.D.'s description of the event likewise proved exaggerated when Ms. N.N. actually talked to G.D. The agency also described the results of its own investigation in an unfair light in the three ways described in the two paragraphs above. This unfairness may be

---

76 Direct exam of N.N., Ytown tape 3B.

77 Ex. 17 at R22.

78 *Id*.

79 *See id*. In making this finding of fact the administrative law judge notes but disbelieves testimony from Ms. N.N. on cross-exam, Ytown tape 5B, where she gave a version of the August interview with B.D. at odds with her previous accounts of that interview.

80 Ex. 17 at R22.

81 Ex. 22 at R15.

82 Ms. N.N. testified that the exaggeration played no role in her decision on substantiation. Redirect of N.N., Anch. digital recording T1 at 34:48.

explained by the three-month delay between the investigation and the decision to substantiate, coupled, perhaps, with the agency's subsequent contacts with Ms. Roe, who talked frequently with OCS through the fall and who is an articulate proponent of the negative spin she places on the August events.

To substantiate a finding of physical abuse, there must be proof by a preponderance of the evidence that a child suffered physical injury "under circumstances that indicate that the child's health or welfare is harmed or threatened thereby."[83] Here, it is undisputed that B.D. suffered a physical injury. The evidence does not show, however, that the injury occurred under circumstances that threatened the child's health or welfare. In making a substantiation finding for physical abuse, OCS did not adequately follow through with its investigation, did not accurately render the results of the investigation that it did conduct, and did not fairly weigh the evidence.

2. Mental Injury

OCS found that John Doe caused mental injury to G.D. in connection with the car seat incident because:

> Both children indicated that they were told to say that the cut occurred in a situation other than the one they stated to be true. Mental injury occurs when a child becomes confused by the expectations of their adult caretakers. If a child is expected to be truthful, they will best be able to comply with this expectation if their adult caretakers model this behavior.[84]

For reasons that have not been explained, OCS did not find mental injury to B.D. based on these conclusions; the finding is limited to G.D.

The notion that the children were told to lie about the car seat incident came solely from Ms. Roe's fiancé and, later, Ms. Roe. There is no evidence that either G.D. or B.D. indicated to Ms. N.N. that they were told to lie: Ms. N.N. recorded no such statement in her record of the interviews,[85] and at the hearing she testified that she had no recollection of the children saying such a thing.[86] Moreover, even Ms. Roe, in her early reports, apparently did not mention any indication that the children had been told to misrepresent the incident. The allegation is absent from the record of her initial call to OCS, as well as from the record of her lengthy in-home

---

83 AS 47.17.290(2), referenced in section 2.2.10.1 of the Child Protective Services Manual.
84 Ex. 2 (Closing Letter).
85 Ex. 23 at R24.
86 Cross-exam of N.N., Ytown tape 5B.

interview about the incident.[87] Most likely, the claim that the children were actually told to lie first surfaced in the account of Ms. Roe's fiancé on August 23.[88]

At the hearing, Ms. Roe testified in moment-by-moment detail about how she learned to her dismay, prior to any report to OCS, that G.D. and B.D. had been told to lie.[89] By her account at the hearing, she attached great significance to this discovery. Yet she did not pass it on to OCS in her early reports, which instead focused on the injury itself and the supposed discrepancies in the documentation. Her account at the hearing is not wholly credible when viewed against this background.

Mr. Doe and Ms. Johnson reported the car seat incident to Ms. Roe, and they reported to her that B.D. was injured in the incident. It is possible that they thought the car seat incident did not account for the external cut on B.D.'s lip, and that they reminded the children to tell their mother of another incident they had heard about that might account for that particular cut. It is unlikely, however, that they would have told the children to lie about a tiny injury to cover up an incident that they themselves were reporting, complete with an acknowledgement that it caused a "cut." In these circumstances, the late report from the fiancé and the even later allegation from Ms. Roe, with no corroboration from the children themselves, is simply too thin a reed on which to label a parent a child abuser.

To substantiate a finding of abuse on the basis of "mental injury," the preponderance of the evidence must show "an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment of the child's ability to function."[90] The evidence that such an injury occurred in connection with the car seat incident falls well below a preponderance.

B. The Mukluk Incident

OCS substantiated mental abuse of both children in connection with the mukluk incident because of its view that Mr. Doe used public humiliation as a form of discipline and exhibited "a lack of awareness for sensitive issues with the children."[91] In making this decision, OCS relied

---

87 Ex. 23 at R25-23; Ex. 22. Ms. N.N. indicated at the hearing that Ms. Roe did say in her in-home interview that the children were told to lie. Ytown tape 3A. It would be extraordinary, however, for Ms. N.N. to omit to record so critically important an allegation if it had been made during the interview. Most likely, she was recalling the allegation from a later conversation with Ms. Roe.

88 Ex. 23 at R25.

89 Direct exam of Roe, Xtown tape 5A.

90 AS 47.17.290(2), referenced in section 2.2.10.1 of the Child Protective Services Manual.

91 Ex. 10 (Investigation Summary).

heavily on its interview with G.D.[92] It also placed some reliance on the report of encopresis.[93] Finally, it placed great stock in a "paradox" it thought it detected in John Doe's mindset on the incident.[94] In approaching this incident, it will be easiest to first address the last two grounds for substantiation, done in Parts 1 and 2 below, and then to turn to the much more complicated question of whether OCS has demonstrated that G.D.'s account is strong enough evidence to support a finding of abuse. G.D.'s account is weighed in Part 3, and then its integration with other available evidence is addressed in Part 4.

1. Encopresis

Ms. Roe did not mention the encopresis until a month after the mukluk incident, and at that time she said it began "a couple of weeks" before her report. This suggests that it began two to two-and-a-half weeks after the mukluk incident.[95] The condition was never evaluated or confirmed by a professional of any kind. Ms. N.N. did no follow up on the allegation in any way, not even asking Mr. Doe about it.[96] Notably, at least one alternative explanation for the encopresis existed: that Mr. Doe allegedly had told the children that there was a "poop monster" in the toilet.[97] (While it would not be an example of wise parenting, this statement to the children—if it occurred—is not the mental abuse OCS was substantiating). Nonetheless, Ms. N.N. relied on encopresis in her substantiation decision on the mukluk incident.

At the hearing, the evidence to connect the encopresis to the mukluk incident remained ethereal. OCS offered no professional evidence that encopresis beginning two weeks after the mukluk incident could stem from that incident and hence be useful as corroboration that the incident occurred. It offered no analysis of why the condition should not be attributed to some other cause, such as the alleged "poop monster" comment or simply the enormous stress placed on B.D. by his parents' toxic relationship. Under the circumstances, it must be discarded as evidence to support substantiation.

---

92 Ex. 23 at R36 ("Will substantiate the allegations. [John] denies, but G.D. confirmed.").

93 Ex. 10.

94 *Id.*

95 Ex. 23 at R36. At the hearing she testified to a time of onset closer to the date of the mukluk incident, but the November report seems the more reliable evidence on this point.

96 Cross-exam of N.N., Ytown tape 6B.

97 Ex. 23 at R36.

2. Paradoxical Views of Accused Parent

The primary written explanation of OCS's decision to substantiate is dominated by an explanation of a "paradox," apparently offered to show that Mr. Doe's refusal to admit to an abusive version of the mukluk story is illogical. The explanation reads:

> At one point in the interview with [John], [John] stated that [G.D.] was not being truthful about the situation. He said that she has a really good imagination. He then mentioned that the children have been seeing [T.T.] He said he did not think [T.T.] was really qualified to be doing play therapy with his children. He said that [G.D.] told him that [T.T.] had said that she did not like Daddy [John] and that recently she had told [G.D.] that she is starting to like Daddy [John]. [John] said that a therapist who would say something like that to a child should not be doing anything like play therapy. Officer [J.J.] of the [Xtown] Police Department asked [John] if he believed [G.D.] was telling the truth about the statements by [G.D.] about the therapist. [John] said he did. Officer [J.J.] then asked him why he [John] thought that [G.D.] would not be telling the truth about the situation with the mukluks. [John] replied that the situation with the mukluks did not happen in the same way as [G.D.] had said. [John] did not seem to realize the paradox of believing the one story and not believing the other story.[98]

OCS returned to this theme in its Closing Letter, stating: "During the interview with [John Doe] which was also attended by Officer [J.J.] of [XPD], [John] stated that he did not believe that [G.D.] was telling the truth about the mukluk incident, yet did believe that she was telling the truth about another incident which placed himself in a favorable light."[99]

It is baffling that OCS views the conversation in the quoted paragraph as paradoxical. Mr. Doe had no firsthand knowledge of the therapist's comments to G.D., and no reason to disbelieve G.D.'s account. Regarding the mukluk incident, on the other hand, Mr. Doe had firsthand knowledge, and it is not odd that he would trust his own firsthand knowledge over someone's report of what G.D. said about the incident. If it is OCS's view that a parent who hears one distorted account from a five-year-old child must, to be logical, disbelieve everything else that child says on any topic, the administrative law judge rejects this view; it is unsupported by any evidence offered in the proceeding and contrary to common sense. Moreover, the case worker's extraordinarily heavy reliance on this "paradox" to support her finding diminishes confidence in the manner in which she evaluated other aspects of the investigation.

---

98 Ex. 10 at R44.

99 Ex. 1.

3. G.D.'s Account

OCS was unable to gather any information directly from B.D. regarding the mukluk incident,[100] and it recognizes, correctly, that a second-hand account from a parent with an agenda to modify custody is of limited value.[101] Apart from the encopresis and the "paradox," the key to its substantiation was therefore the first-hand interview of G.D. conducted in the Roe home. Q.Q. of OCS and Sergeant J.J. of XPD conducted the interview together.

A natural starting point in evaluating the interview is to review the circumstances under which it was conducted. In two central respects, however, those circumstances are unclear. First, the OCS case worker testified that interviews with young children diminish in reliability as the child is interviewed multiple times about an incident. The more times someone speaks to the child about an event, the less sure the child becomes about his or her own perceptions and the more the tendency to give the interviewer the information the child thinks is wanted.[102] There is, however, no evidence of how many times G.D. had been asked to recount the mukluk incident before the Q.Q./J.J. interview.

It is likewise unclear whether Q.Q. and J.J. interviewed G.D. by herself or whether they permitted Ms. Roe to be in the room during the interview. Ms. Q.'s report of contact (ROC) note does not indicate that the child was interviewed alone.[103] Ms. Q.'s recollection in testimony was that she interviewed G.D. without the mother present, and she plainly recognizes that the interview would be of diminished value as evidence if the mother had been in the room. On the other hand, her co-interviewer, Sgt. J.J., testified without a trace of doubt that Ms. Roe was present during the interview. He subsequently retracted that testimony when directly prompted by OCS counsel, but the retraction seemed less credible than the very positive testimony he initially gave.[104]

While the circumstances of the interview are not established, the substance of the interview with G.D. is well described in Ms. Q.'s ROC note for the date. Except for the material in parentheses, the remainder of this paragraph is drawn from the ROC entry. The interviewers talked with G.D. about where she had stayed the previous weekend; she indicated that she had been at Mr. Doe's house with B.D. and her cousin David. She apparently was not asked about

---

100 Ex. 23 at R31.

101 Cross-exam of N.N., Ytown tape 4B.

102 ALJ exam of N.N., Anch. digital recording T1 at 16:30-19:00.

103 Ex. 23 at R32-31.

104 Direct exam of J.J., Xtown tape 2B. As discussed more fully below, Sgt. J.J.'s repeated willingness to substitute the recollection of others for his own was disconcerting.

whether any additional people were present at any particular time during the weekend. Ms. Q.Q. then asked her what happens when a child gets in trouble at her father's house. G.D. responded that you have to take your clothes off, all of them including your underwear, and show people. (Ms. Q. believes this to have been an overstatement, since she believes clothing removal occurred only once as a disciplinary measure).[105] G.D. asked if the interviewers wanted to know "the whole story." (G.D.'s enthusiasm to tell more recalls her mother's fond description of her as "the informer").[106] The interviewers responded in the affirmative. The interview continued:

> She explained that [B.D.] was taking caribou fur out of her dad's mukluks. She demonstrated this with her hand. She went to tell her Daddy [John] because she knew he would tell [B.D.] to stop. Daddy [John] came in and told him to take off all his clothes. He said that he was going to count to three if [B.D.] didn't do it, and [B.D.] said no you didn't have to count and he took all his clothes off. He had to stand there naked. They were at the home. According to [G.D.], [B.D.] had to stand there without his clothing on until the movie was over. She estimated that to be about twenty minutes. The movie they were watching was Little Foot. She said that [B.D.] wanted to get his clothes back on. She said that [B.D.] had to show but they didn't really have to look, and she demonstrated at various points that she covered her eyes. . . . She said she covered her eyes to try not to look and [B.D.] went upstairs to put on different clothes. She doesn't think this has ever happened before as a form of punishment. Officer [J.J.] asked her to describe the mukluks, which she did in great detail even demonstrating with her hands about how tall they were and the shape of them. . . . When asked if she though [B.D.] was scared, she demonstrated an expression on his face. It was unclear as to what that meant. She said he had to wear different clothes because there was fur all over his clothes, and Daddy [John] knew people would laugh at his clothes.

(The interviewers took no steps to test the five-year-old child's time perception in connection with the statement that the incident lasted twenty minutes.)[107]

All of the professional witnesses agreed that the process of interviewing a young child requires the exercise of special cautions and skills, both because of the potential for suggestion and because an account could become altered or more lurid after the child interacts with a parent who is embroiled in a custody battle with the subject of the account. In evaluating whether this interview was conducted sufficiently well that the account should be considered wholly factual, contemporaneous records of the interview would be helpful. There were two contemporaneous records of the interview of G.D.: a digital recording made by Sgt. J.J., and a set of notes made

---

105 Cross-exam of Q.Q., Xtown tape 2A.
106 Direct exam of Roe, Xtown tape 4A.
107 Cross-exam of Q.Q., Xtown tape 2B.

by Ms. Q. during the interview. Both have been destroyed. Sgt. J.J. eventually erased the digital recording from an XPD server as a routine matter (XPD apparently believes it lacks computer capacity to retain recordings in cases such as this), and for reasons that were not explored at the hearing OCS did not obtain the recording prior to its destruction.[108] Ms. Q. shredded her own contemporaneous notes from the interview as soon as she had dictated a summary.[109]

The interviewers who talked to G.D. both had some training in forensic interviewing of children, and their views of whether the account was reliable could have some value. Here again, however, there is less useable evidence than might be desired.

The second interviewer at the October 19 interview was Sergeant J.J. OCS sought to rely on Sgt. J.J.' testimony to bolster the view that G.D.'s account of the mukluk incident was wholly accurate. On direct exam, Sgt. J.J. testified smoothly and in some detail about the content of the interview and indicated that he found the account completely credible. With the exception of the miscue regarding the presence of Ms. Roe, mentioned above, his testimony closely corroborated Ms. Q.'s testimony and ROC note. Later, it was brought out that he had asked for and read the ROC note an hour before the hearing. He explained: "I knew we had this hearing coming up and I totally, like I said, it was a non-criminal matter that I just didn't have much recollection of."[110] When questioned about another interview in this investigation, the October 31 interview of John Doe—for which he did not have an opportunity to review the ROC note—his recollection of the substance of the conversation was virtually nonexistent.

Sergeant J.J. testified that he has done hundreds of potential child abuse investigations. It is likely that, as he eventually admitted, he "just didn't have much recollection" of the interview with G.D. and that much or all of the detail he supplied came from Ms. Q.'s account, not his own recollection. Indeed, Sgt. J.J.'s recollection of aspects of the meeting not covered in the ROC note was so hazy that at one point in his testimony he was willing to place G.D.'s age at the time of the interview as high as eight.[111] She was five.[112]

---

[108] Direct exam of J.J., Xtown tape 2B; cross-exam of Q.Q., Xtown tape 2A.

[109] ALJ exam of Q.Q., Xtown tape 2B.

[110] ALJ exam and cross-exam of J.J., Xtown tape 3B.

[111] Redirect exam of J.J., Xtown tape 3B. J.J. had previously placed her age at six or seven, but seemed to sense from the fact that OCS counsel asked him a second time that he had guessed wrong in his first estimation. He then expanded the range upward to eight.

[112] There were several other disturbing elements of Sgt. J.J.'s testimony. None related directly to the October 19 interview, but each undermined his overall credibility as a witness. Two examples are offered here. First, his account during the hearing of the reasons for his attendance at the later October 31 interview was contradictory. At various points in his testimony he explained that he attended as a service to OCS because his criminal investigation was closed at that time, or alternatively that he attended in order to complete his criminal investigation. While the substance of the testimony on that issue was not important, the evolution of his account under cross-examination

In light of these credibility issues, Sgt. J.J.'s evaluation of the interview with G.D. can be given scant weight. One is left only with Ms. Q.'s account and evaluation of the interview, without the benefit of the destroyed recording or notes for verification. Ms. Q.'s judgment, after the interview, was that G.D. was "plausible" and that she "would lean toward" substantiation.[113]

4. Overall Strength of Case for Substantiation on Mukluk Incident

It is not disputed that the mukluk incident occurred. Mr. Doe admits that he caught his son pulling hair from the mukluks, with his clothes covered in hair, and directed him to remove his clothes on the spot, go upstairs, and change. He recalls that B.D. was not happy. He says he knows his son took off his pants, and is unsure about the shirt. He does not remember if B.D. was wearing underwear—apparently he did not always do so—but thinks he probably would have noticed if B.D. was not. He denies telling anyone to look at B.D. He estimates the duration of the event at less than a minute.[114]

There were two corroborating witnesses, teenagers Jack S. and Joe Y., who typically were present in the home on weekends in the fall of 2005 and who claimed to have been present when B.D. got into the mukluk hair. They testified to a brief and completely unremarkable incident in which B.D. was asked to remove his outer clothing and sent upstairs, momentarily crossing their line of sight as they played a video game.[115] Their testimony was difficult to credit, however,[116] and, if it had any basis in fact, may have been a description of an incident other than the one G.D. was relating.

While Mr. Doe's account is plausible, it certainly does not end the inquiry. Ultimately, however, it is OCS's burden to show that the incident was fundamentally different from the way he describes it and thus was abusive in character.

---

undermined his credibility. Second, when asked if he had once explained his attendance at the October 31 interview by saying he was there because John Doe was a [council member], he denied it vehemently, declaring, "that's outrageous." Cross-exam of J.J., Xtown tape 3A. Yet OCS employee N.N., Susan Johnson, and John Doe all recalled that statement. (Strangely, on the following day of the hearing, N.N. denied that she had agreed only the day before that J.J. made the statement, and testified instead that she could not remember who made the statement. Re-cross of N.N., Anch. digital recording T1 at 1:19:00-1:21:00. This reversal also lacked credibility).

113 This assessment was made to Ms. N.N. Cross-exam of N.N., Ytown tape 6B.

114 Direct exam of Doe, Anch. digital recording T2 at 34:00.

115 Direct exam of Jack S, Xtown tape 4A; direct exam of Joe Y, Xtown tape 3B.

116 Jack S. had great difficulty remembering where he had lived as recently as the previous year, and yet claimed minute recall of a non-event the prior October that had essentially no impact on him. Joe Y. claimed a similarly detailed memory, but changed details of his story from early to late June of 2006. Xtown tape 3B-4B.

Although the boys seemed to make up details for their stories in a misguided attempt to sound believable, it is not out of the question that they were present at the time of the incident and that the gist of their account is true. Notably, G.D. was never asked who was in the house at the time of the mukluk incident; OCS asked her only who was generally present during the entire weekend of the visitation. Ex. 23 at R32.

There are three salient features that, taken together, give the OCS version of this incident its troubling character that likely would qualify as abuse through mental injury: (1) the instruction to strip naked, (2) the instruction to the other children to look, and (3) the requirement that B.D. stand on humiliating exhibition for an extended period. On each of these points, the OCS case has significant weaknesses.

First, although the OCS Closing Letter finds that Mr. Doe used "nudity for discipline,"[117] it is notable that the OCS case worker responsible for the investigation did not believe, at least on the second day of the hearing, that B.D. was actually made to remove his underwear: "Based on the interviews, I think, in the interviews with the children that he really just went down to his underwear."[118] On the third day of the hearing, she reversed herself on this issue in response to a leading question from her attorney, agreeing that "the child was made to stand completely naked."[119] To be fair, her reversal does bring her into accord with the written record of G.D.'s interview, but it is notable that she finds the evidence equivocal.

Regarding the second element, the OCS version is even weaker. When she relied on the interview with G.D. to substantiate the mukluk incident allegation, Ms. N.N. had a fundamental misunderstanding of Ms. Q.'s interpretation of the interview. Ms. Q. made it clear, both in her ROC note and in her testimony at the hearing, that she understood from G.D. that the other children were *not* told to look at B.D. when he was undressed.[120] Ms. N., however, testified that she understood from Ms. Q. that G.D. had said "they were asked to look."[121] This was the understanding on which she based her decision to substantiate. Little evidence, and none directly from G.D., supports this understanding.

Regarding the third element, G.D. is the sole source of the twenty-minute duration OCS attributes to the episode. Given the difficulty young children often have in sensing the passage of time, one would expect that someone interviewing a five-year-old on so important a matter would probe to get a better sense of how much time actually went by. Q.Q. and J.J. made no effort to look behind the twenty-minute estimate, however.

Three additional factors argue against substantiation. First, if the event were as dramatic and mentally damaging as it has been portrayed, one might expect it to come up in the children's therapy sessions. It did not; the therapist "stated that the children have not mentioned anything

---

117 Ex. 1.

118 Direct exam of N.N., Ytown tape 3B.

119 Anch. digital recording T1 at 1:28:30.

120 Ex. 23 at R31 ("they didn't really have to look"); cross-exam of Q.Q., Ytown tape 2B.

during therapy regarding any of the issues that have come to the attention of child protective services."[122] A finding of "mental injury" requires "an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment of the child's ability to function."[123] It is notable, though not conclusive on this issue, that the only mental health professional in a position to evaluate the children after the mukluk incident had heard nothing of the event.

The second factor is destruction of evidence. OCS and XPD cooperated in this investigation. Regarding the most critical single element of the investigation, the interview of G.D., the two agencies failed to preserve the best evidence of the interview's methodology and content: the digital recording of the interview. Even if it is true that XPD lacks the computer resources to preserve a file of this kind, OCS knew of the recording and should have taken steps to preserve it. A formal finding that labels a person a child abuser is too important a matter to permit the casual approach toward evidence preservation that OCS has taken in this case.[124]

Third, substantiation in a case such as this one necessarily relies on a great deal of second-hand information from OCS investigators. It therefore requires a measure of confidence that the investigators have approached the matter in an objective, thorough, and fair-minded way. Here, that confidence is not possible, for reasons that include the following:

-- The caseworker's inaccurate and unfair recounting of the evidence in connection with the prior abuse allegation (the car seat incident);

-- The caseworker's indifference, in connection with the prior incident, to indications that Ms. Roe had exaggerated portions of her account;

-- The excessive reliance on a sophistic "paradox" in discounting Mr. Doe's explanation for the mukluk event;

-- The hasty reliance on encopresis as corroboration without any effort to evaluate the condition or investigate its potential causes;

---

121 Re-cross of N.N., Anch. digital recording T1 at 1:09:45.

122 Ex. 23 at R36; cross-exam of N.N., Ytown tape 6B.

123 AS 47.17.290(2), referenced in section 2.2.10.1 of the Child Protective Services Manual.

124 As a legal matter, the failure to preserve the recording could potentially be treated as spoliation of evidence. In general, courts and administrative tribunals have some discretion in fashioning an appropriate remedy for failure to preserve or produce evidence in a particular case, but a commonly applied principle is that "where relevant evidence which would properly be part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." *Henderson v. Tyrrell,* 910 P.2d 522, 532 (Wash. App. 1996); *see also, e.g., Sweet v. Sisters of Providence,* 895 P.2d 484 (Alaska 1995). Here, no spoliation sanction is applied, but the loss of the recording is noted as a factor in weighing whether the agency has met its overall burden of proof.

-- The agency's avoidance of Mr. Doe and his attorney after the October 31 interview, failing to respond to their request to know if the investigation was ongoing, while at the same time continuing an extensive dialogue with Ms. Roe;

The support for a finding of child abuse by mental injury is much weaker than the agency's estimation in its Investigation Summary. Viewed as a whole, the evidence does not rise to a showing, by a preponderance, that G.D. or B.D. suffered mental injury as defined in AS 47.17.290(2) as a result of the mukluk incident.

V. Conclusion and Order

Because the preponderance of the evidence does not sustain them, the findings of substantiation of child abuse in the OCS Closing Letters to John Doe regarding Case ID 910823 are withdrawn.

DATED this 15th day of December, 2006.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 16th day of January, 2007.

By: *Signed*
Signature
Karleen K. Jackson
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication.]